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No. 88-1726

In The

Supreme Court of the United States

October Term, 1988

STEVEN DOE & MARGARET DOE, et al.,

Petitioners,

vs.

HENNEPIN COUNTY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER FAILURE TO FOLLOW CONSTITUTIONALLY INSIGNIFICANT STATE REGULATIONS EITHER GIVES RISE TO A CONSTITUTIONAL VIOLATION OR DEPRIVES STATE OFFICIALS WHO HAVE ACTED IN AN OBJECTIVELY REASONABLE MANNER OF QUALIFIED IMMUNITY.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Contrary to Appellants' Statement of the Case, Respondents received very specific allegations that the Appellants' two children, ages two and five, were involved in sexually precocious behavior and that their father had engaged in sexual behavior involving one of the children, while under the influence of marijuana. *Doe v. Hennepin County,* 858 F.2d 1325, 1326 (8th Cir. 1988) (Appellants' App. 3).

Specifically, on December 7, 1982, Mr. Adrian Yackley reported that he was a frequent visitor in Appellants' home, that the mother told him the father had "smoked some horny pot" and "came on one of the children three times." He repeated these allegations on December 13, 1982. Additionally, he reported that the two-year-old sat on his lap and made sexual movements. The five-year-old simulated smoking marijuana and one of the girls engaged in "excessive masturbation." Then, on December 17, 1982, Adrian Yackley repeated the allegations to the police in person and additionally asserted that he observed the two-year-old put three fingers down her throat and gag and fondle herself as though masturbating. She tried to undress him, put her hands in his pants and sit on his lap and made sexual movements. He had also observed the five-year-old stick her fingers into her vagina. He witnessed the use of marijuana by Appellants at their home. *Doe v. Hennepin County*, Judge Murphy, D. Minn, No. 4-84-115 (July 1, 1987) (Appellants' App. 30 to 32).

The children were removed from Appellants' home on December 21, 1982 pursuant to an ex parte Juvenile Court order. A hearing was held the following day at which the Appellants were represented by legal counsel, called witnesses and testified on their own behalf. The Juvenile Court continued the children in protective custody at the conclusion of the hearing, but placed them in the foster care of their aunt and uncle. The following day the children were interviewed by an independent social worker hired by Respondents for the purpose of assessing the allegations concerning the children. The five-year-

old initiated the conversation by volunteering the statements: "My daddy didn't do anything; he's a good daddy; he didn't sneak into my cunny [vagina]." "If my daddy sneaked into my cunny, they would throw him into jail," and, "My mommy doesn't either." *Doe v. Hennepin*, Judge Murphy, D. Minn, No. 4-84-115 (July 1, 1987) (Appellants' App. 35). The social worker concluded that the children had been sexually acted upon, but did not reach any conclusion as to the identity of the abuser. Affidavit of Thomas L. Price, March 27, 1984.

On January 6, 1982, a Hennepin County social worker interviewed Appellants at their home and concluded that the allegations make by Adrian Yackley were without foundation. The Juvenile Court allegations were dismissed without prejudice, but the Appellants agreed to undergo regular counseling with a court-appointed psychologist. *Doe v. Hennepin County*, Judge Murphy, D. Minn, No. 4-84-115 (July 1, 1987) (Appellants' App. 36). The children were reunited with their parents after having spent 15 days with their aunt and uncle with visitation from their parents and one day in a Children's Home.

The Appellants have conceded below that although they believe that the Respondents exercised profoundly bad judgment in believing Adrian Yackley's allegations, the Respondents cannot be held liable for "believing a serious child abuse situation existed [or] . . . for deciding that the allegations were serious enough to warrant separation of the children from their parents." *Doe v. Hennepin County*, Judge Murphy, D. Minn, No. 4-84-115 (July 1, 1987) (Appellants' App. 37).

Appellants began the instant litigation on February 16, 1984. On July 1, 1987 and upon rehearing on August 13, 1987, after a careful review of the volumes of evidence submitted by the parties, Judge Murphy (D. Minn.) granted Respondents' motion for summary judgment on the grounds that the Appellants failed to assert a valid federal claim. Juge Murphy rejected the Appellants' claim their federal constitutional rights had been violated by Respondents' failure to follow mandatory state regulations; and also rejected their claim that the Respondents were not entitled to qualified immunity based upon those same state regulatory violations. *Doe v. Hennepin County,* Judge Murphy, D. Minn, No. 4-84-115 (July 1, 1987 and August 13, 1987) (Appellants' App. 15 and 27).

REASONS FOR DENYING WRIT

I. APPELLANTS DO NOT PRESENT A VIABLE FEDERAL QUESTION.

A. FAILURE TO FOLLOW STATE REGULATIONS WHICH HAVE NO INDEPENDENT CONSTITUTIONAL SIGNIFICANCE DOES NOT CREATE A CONSTITUTIONAL VIOLATION.

Deliberate indifference to state regulations does not create a constitutional violation where the regulations themselves have no independent constitutional significance or where the injured party is not in a special relationship with the state. *Taylor v. Ledbetter,* 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied sub nom. Ledbetter v. Taylor,* 109 S.Ct. 1337 (1989) (special relationship and duty exists for children involuntarily placed in the foster

custody of the state); *cf. Archie v. City of Racine,* 847 F.2d 1211 (7th Cir. 1988) (en banc), *cert. denied,* 109 S.Ct. 1338 (1989) (special relationship does not exist between city and citizen for rescue services); *Myers v. Morris,* 810 F.2d 1437 (8th Cir. 1987), *cert. denied,* 108 S.Ct. 97 (1987) (state child abuse regulations have no independent constitutional significance).

The specific child abuse regulations at issue in the present case were addressed in *Myers,* 810 F.2d 1437. They were found to be without independent constitutional significance. Two principles underlie the ruling in *Myers.* First, it is well settled that state regulations in themselves do not establish what constitutional process is due. *Mangels v. Pena,* 789 F.2d 836, 838, 839 (10th Cir. 1986); *Equia v. Tompkins,* 756 F.2d 1130 (5th Cir. 1985); *Vruno v. Schwarzwalder,* 600 F.2d 124 (8th Cir. 1979), 130-131. Secondly, state regulations which provide for governmental services do not create constitutionally protected entitlements to such services to those not in a special relationship with the state. *Archie v. City of Racine,* 847 F.2d 1211 (7th Cir. 1988) (en banc), *cert. denied,* 109 S.Ct. 1388 (1989); see also *DeShaney v. Winnebago County Department of Social Services,* 109 S.Ct. 998 (1989).

B. WHERE CHILDREN ARE AT RISK FROM SEXUAL ABUSE, REMOVAL FROM THE HOME FIRST, FOLLOWED BY A HEARING ON THE NEED TO REMOVE THEM IS A CONSTITUTIONALLY ADEQUATE PROCEDURE.

The Appellants have conceded below that no liability exists "in believing that a serious child abuse situation

existed [or] . . . for deciding that the allegations were serious enough to warrant separation of the children from their parents," *Doe v. Hennepin County*, Judge Murphy, D. Minn, No. 4-84-115 (August 13, 1987) (Appellants' App. 18). Under such circumstances case law is consistently clear that the state may intervene on behalf of child victims, although it infringes upon the parents' interest in the family, where the state provides an adequate post-deprivation hearing. *Davis v. Page*, 618 F.2d 374, 381 (5th Cir. 1980), *cert. denied*, 464 U.S. 1052 (1984); *Ellis v. Hamilton*, 669 F.2d 510, 515 (7th Cir.), *cert. denied*, 459 U.S. 1069 (1982); *In re Scott County Master Docket*, Civil No. 3-85-774, slip op. at 4 (D. Minn. Nov. 2, 1987) (in a child removal context, post-deprivation remedies may be particularly appropriate).

Appellants have acknowledged the seriousness of the allegations against the father, namely, that he engaged in sexual behavior with one of his children while under the influence of marijuana. These are allegations for which an adequate post-deprivation hearing is constitutionally permitted.

The Appellants received a constitutionally adequate hearing the following day. They were represented by legal counsel, testified on their own behalf and called witnesses. Appellants rely on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (whether a hearing is required prior to termination from employment); and *Goss v. Lopez*, 419 U.S. 565 (1975) (whether a hearing is required prior to suspension from school). Neither applies to the circumstances as here where a child's interest in freedom from parental abuse conflicts with the parents' right to have their children with them. In cases

such as *Loudermill* and *Goss*, there is usually time enough for a pre-deprivation hearing, unlike the case where a child is at risk for continued abuse.

II. THE APPELLATE COURT'S DETERMINATION THAT THE RESPONDENTS' ACTIONS WERE OBJECTIVELY REASONABLE ENTITLES RESPONDENTS TO QUALIFIED IMMUNITY IN ACCORDANCE WITH PRINCIPLES OF *ANDERSON V. CREIGHTON*, 107 S.Ct. 3034 (1987).

Respondents' are entitled to qualified immunity under the objective standard test recently set forth in *Anderson v. Creighton*, 107 S.Ct. 3034 (1987), as applied in *Myers*, 810 F.2d at 1462. The 8th Circuit in *Myers* established that governmental officials are entitled to qualified immunity where they "have at least arguable probable cause to believe that adults are molesting children." *Myers*, 810 F.2d at 1462.

The Court below determined that the Respondents' actions were "objectively reasonable." *Doe v. Hennepin County*, 858 F.2d at 1329 (Appellants' App. 11). It is not a surprising conclusion in light of the Appellants' concession that arguable probable cause existed to believe that the Doe children were victims of sexual abuse by their father. *Doe v. Hennepin County*, Judge Murphy, D. Minn, No. 4-84-115 (July 1, 1987) (Appellants' App. 37). The Eighth Circuit's conclusion that the Respondents, under an objective test, are entitled to qualified immunity is in accord with the principles of *Anderson*, 107 S.Ct. 3034 and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The Eighth Circuit's comments regarding the existence of malice are dicta under the *Anderson* and *Harlow* test for determining qualified immunity. The determination of objective reasonableness is all that the court need have discussed to reach its conclusion that Respondents are entitled to qualified immunity. Its discussion of malice merely demonstrates that even under the older subjective test the Respondents would have been entitled to immunity.

CONCLUSION

The Eighth Circuit's opinion is well founded in case law construing Sec. 1983 and the federal constitution; the specific facts of this case present no extraordinary basis or reason justifying review by the nation's highest court. For these reasons, a writ of certiorari should not be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

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